A

SABAH DEVELOPMENT BANK BHD v. PETRON OIL (M) SDN BHD

COURT OF APPEAL, PUTRAJAYA
ABDUL RAHMAN SEBLI JCA
KAMARDIN HASHIM JCA
B HARMINDAR SINGH DHALIWAL JCA
[CIVIL APPEAL NO: S-02(NCVC)(W)-1430-08-2016]
2 JANUARY 2019

C ***CONTRACT:*** *Assignment – Assignment to contract proceeds – Security for banking facilities – Absolutely assigning all contract proceeds to bank – Whether bank holding sum in project account as constructive trustee – Whether bank's duty to return money to rightful owner – Whether unconscionable conduct for bank to claim entitlement to money by relying solely on assignment of contract proceeds – Legal effect and consequence of assignment of contract proceeds – Whether*
D *considered – Whether contract proceeds lawfully and absolutely assigned to bank*

BANKING: *Banks and banking business – Banking facilities – Security for banking facilities – Assignment of contract proceeds – Absolutely assigning all contract proceeds to bank – Whether bank received sum in project account as constructive trustee – Whether bank's duty to return money to rightful owner –*
E *Whether unconscionable conduct for bank to claim entitlement to money by relying solely on assignment of contract proceeds – Legal effect and consequence of assignment of contract proceeds – Whether considered – Whether contract proceeds lawfully and absolutely assigned to bank*

F ***TRUSTS:*** *Constructive trust – Creation of – Assignment – Assignment of contract proceeds – Security for banking facilities – Absolutely assigning all contract proceeds to bank – Whether bank holding sum in project account as constructive trustee – Whether bank's duty to return money to rightful owner – Whether unconscionable conduct for bank to claim entitlement to money by relying solely on assignment of contract proceeds – Legal effect and consequence of assignment of contract proceeds*
G *– Whether considered – Whether contract proceeds lawfully and absolutely assigned to bank*

Swakaya Sdn Bhd ('Swakaya') was awarded a contract by Sabah Electricity Sdn Bhd ('SESB') to supply and deliver diesel fuel to its power stations ('the
H SESB contract'). The respondent, Petron Oil (M) Sdn Bhd ('Petron'), was engaged in the business of supplying petroleum and petroleum-related products. It was common ground that Swakaya had requested Petron to supply and deliver the diesel fuel directly to SESB, and Swakaya consented to SESB making direct payment to Petron. In order to finance and carry out the SESB contract, Swakaya applied for, and was granted, two banking
I facilities by the appellant, Sabah Development Bank Berhad ('SDBB'). As security for the banking facilities granted by SDBB, Swakaya, by an

assignment of contract proceeds, absolutely assigned all the contract proceeds from the SESB contract to SDBB. The assignment was expressed to be absolute. Written notice of the assignment was given to SESB, and Swakaya irrevocably instructed SESB to remit all contract proceeds from the SESB contract to a project account with Malayan Banking Berhad ('the Maybank project account'). SDBB's managers and officer(s) were appointed as the authorised signatories of the Maybank project account. It was the testimony of SDBB's witnesses that SDBB would utilise all of the contract proceeds paid by SESB into the Maybank project account to reduce the debt owing by Swakaya to SDBB. Petron, however, disputed that the contract proceeds could be used for that purpose. Subsequently, the Maybank project account was frozen by the Malaysian Anti Corruption Agency ('MACC'). As a result, Swakaya agreed to open a second account with CIMB Bank Berhad ('the CIMB project account') which was to be utilised for the same purpose *ie* for receiving payment of the SESB contract proceeds in place of the Maybank project account. In November 2013, Petron had been paid in full for the diesel fuel that it supplied and delivered to SESB and payment was made from the CIMB project account. SDBB believed that these payments were made before its officer and managers were appointed as the authorised signatories of the CIMB project account sometime in March 2014. According to SDBB, the payments made by Swakaya to Petron by utilising the CIMB project account were made without its knowledge or consent. Meanwhile, Petron continued to supply and deliver directly to SESB RM50,094,713.79 worth of diesel and SESB had fully paid the sum by remitting payment into the CIMB project account. In total, Petron had been paid a sum of RM26,017,121.95 by SESB *via* the CIMB project account but RM24,835,281.62 remained unpaid. Petron's suit against Swakaya was for this outstanding sum and judgment was entered against Swakaya. Petron's suit herein against SDBB, on the other hand, was on the ground that despite knowing that the said sum of RM24,835,281.62 was payment made by SESB for the diesel fuel supplied and delivered to SESB by Petron, SDBB proceeded to wrongfully withdraw the said sum to settle part of the credit facilities it granted to Swakaya. It was Petron's pleaded case that both Swakaya and SDBB were not entitled to withdraw the said sum from the CIMB project account and by doing so, they had unjustly enriched themselves, at the expense of Petron. Petron's case was that SDBB held the sum of RM24,835,281.62 as trustee or constructive trustee. The issue before the High Court was whether SDBB held the monies in the CIMB project account on trust for Petron. The trial judge found in favour of Petron, hence the present appeal. The issues that arose were whether the trial judge had committed two serious errors of law, namely in failing to (i) consider the legal effect or consequence of the assignment of contract proceeds; and (ii) appreciate that the SESB contract proceeds had been lawfully and absolutely assigned to SDBB.

A B C D E F G H I

Held (dismissing appeal with costs)
Per Abdul Rahman Sebli JCA delivering the judgment of the court:

(1) SDBB had received the said sum of RM24,835,281.62 from SESB as constructive trustee for the benefit of Petron. Therefore, it was SDBB's duty to return the money to its rightful owner, Petron, and not to keep it for itself or to release it to anybody else. It was contrary to good conscience for SDBB to have retained and used the RM24,835,281.62 for its own benefit, notwithstanding the fact that the money had been lawfully and absolutely assigned to it by Swakaya. (para 50)

(2) The reasoning given by SDBB to support its claim that it was entitled to the money was deceptively simple *ie* that since the SESB contract proceeds had been lawfully 'given' to SDBB by way of the assignment of contract proceeds, Petron had lost all rights over the money. However, this reasoning was structurally flawed as it ignored the simple truth that the RM24,835,281.62 was meant as payment for Petron's sale of the diesel fuel to SESB. It was never meant as repayment for Swakaya's loan with SSDB, or for any other purpose. (paras 55 & 56)

(3) There was no evidence that Petron consented to the money being utilised for reducing Swakaya's loan with SDBB. What Petron consented to was Swakaya's request for Petron to supply and deliver the diesel directly to SESB, and for SESB to pay directly to Petron. It was stretching the imagination to suggest that Petron had lost all his rights over the money merely because Swakaya had assigned the contract proceeds absolutely to SDBB. SDBB's insistence that it was lawfully entitled to the RM24,835,281.62 and retaining it for its own use despite knowing that Petron was the beneficial owner of the money was unconscionable conduct on its part. (paras 57 & 58)

(4) The CIMB project account was opened for the specific purpose of making payment to Petron for the diesel fuel that it supplied and delivered to SESB. Both Swakaya and SESB agreed that the RM24,835,281.62 belonged to Petron. It was therefore unconscionable for SDBB to claim entitlement to the money by relying solely on the assignment of contract proceeds. As between Petron and SDBB, clearly the former had better rights over the money as it was payment for the diesel fuel that it had supplied and delivered to SESB. (paras 59 & 60)

(5) There was evidence to show that SDBB, being the sole authorised signatory of the CIMB project account, had paid out to Petron part of the payments, namely for the November 2013 deliveries and part of the December 2013 deliveries. This was proof that SDBB itself acknowledged that these sums of monies that SESB paid into the CIMB project account rightfully belonged to Petron. (para 61)

Bahasa Malaysia *Headnotes*

Swakaya Sdn Bhd ('Swakaya') diawardkan satu kontrak oleh Sabah Electricity Sdn Bhd ('SESB') untuk membekal dan menghantar bahan api diesel ke stesen janakuasa ('kontrak SESB'). Responden, Petrol Oil (M) Sdn Bhd, terlibat dalam perniagaan pembekalan petroleum dan produk berkaitan petroleum. Swakaya telah meminta Petron membekalkan dan menghantar bahan api diesel terus ke SESB, dan Swakaya bersetuju agar SESB membuat bayaran terus ke Petron. Untuk membiayai dan menjalankan kontrak SESB, Swakaya, untuk dan diberikan, dua kemudahan perbankan oleh perayu, Sabah Development Bank Berhad ('SDBB'). Sebagai sekuriti untuk kemudahan perbankan yang diberi oleh SDBB, Swakaya, melalui penyerahan hak hasil kontrak, menyerahkan hak secara mutlak segala hasil kontrak daripada SESB kontrak kepada SDBB. Penyerahhakan dinyatakan sebagai mutlak. Notis bertulis mengenai penyerahhakan diberi kepada SESB, dan Swakaya mengarahkan SESB untuk meremit segala hasil kontrak daripada kontrak SESB kepada satu akaun projek Malayan Banking Berhad ('akaun projek Maybank'). Pengurus-pengurus dan pegawai-pegawai SDBB dilantik sebagai penandatangan yang dibenarkan akaun projek Maybank. Saksi-saksi SDBB memberi keterangan bahawa SDBB akan menggunakan semua hasil kontrak yang dibayar SESB ke dalam akaun projek Maybank untuk mengurangkan hutang Swakaya kepada SDBB. Petron, walau bagaimanapun, mempertikaikan hasil kontrak boleh digunakan untuk tujuan itu. Seterusnya, akaun projek Maybank itu dibekukan oleh Suruhanjaya Pencegahan Rasuah ('SPRM'). Akibatnya, Swakaya bersetuju membuka akaun kedua dengan CIMB Bank Berhad ('akaun projek CIMB') yang digunakan untuk tujuan yang sama iaitu menerima bayaran daripada SESB kontrak menggantikan akaun projek Maybank. Pada November 2013, Petron telah dibayar sepenuhnya untuk bahan api diesel yang dibekalkan dan dihantar olehnya kepada SESB dan bayaran dibuat daripada akaun projek CIMB. SDBB mempercayai bahawa bayaran-bayaran ini dibuat sebelum pegawai-pegawai dan pengurus-pengurusnya dilantik sebagai penandatangan-penandatangan yang dibenarkan akaun projek CIMB pada bulan Mac 2014. Menurut SDBB, bayaran-bayaran yang dibuat oleh Swakaya kepada Petron dengan menggunakan akaun projek CIMB dibuat tanpa pengetahuan dan kebenarannya. Sementara itu, Petron terus membekalkan dan menghantar terus kepada SESB bahan api diesel berjumlah RM50,094,713.79 dan SESB telah membayar sepenuhnya jumlah itu dengan meremitkan bayaran kepada akaun projek CIMB. Secara keseluruhannya, Petron dibayar jumlah RM26,017,121.95 oleh SESB melalui akaun projek CIMB tetapi RM24,835,281.62 masih tidak dibayar. Guaman Petron terhadap Swakaya adalah untuk jumlah tertunggak ini dan penghakiman dimasukkan terhadap Swakaya. Guaman Petron adalah terhadap SDBB, atas alasan bahawa walaupun SDBB mengetahui jumlah RM24,835,281.62 adalah bayaran oleh

SESB untuk bahan api diesel yang dibekalkan dan dihantarkan kepada SESB oleh Petron, SDBB secara salah mengeluarkan jumlah tersebut untuk menyelesaikan sebahagian kemudahan kredit yang telah diberi kepada Swakaya. Petron memplidkan bahawa kedua-dua Swakaya dan SDBB tidak berhak mengeluarkan jumlah tersebut daripada akaun projek CIMB dan dengan berbuat demikian, mereka telah dengan tidak adil mengkayakan diri mereka sendiri, dan merugikan Petron. Kes Petron adalah bahawa SDBB memegang jumlah RM24,835,281.62 sebagai pemegang amanah atau pemegang amanah konstruktif. Isu di Mahkamah Tinggi adalah sama ada SDBB memegang wang dalam akaun projek CIMB atas amanah untuk Petron. Hakim bicara memihak pada Petron dan oleh itu, rayuan ini. Isu-isu yang timbul adalah sama ada hakim bicara telah melakukan dua kesalahan undang-undang yang serius apabila gagal (i) mengambil kira kesan undang-undang atau akibat penyerahhakan hasil kontrak; dan (ii) mempertimbangkan bahawa hasil kontrak SESB telah secara sah dan diserah hak secara mutlak kepada SDBB.

Diputuskan (menolak rayuan dengan kos)

Oleh Abdul Rahman Sebli HMR menyampaikan penghakiman mahkamah:

(1) SDBB telah menerima jumlah RM24,835,281.62 tersebut daripada SESB sebagai pemegang amanah konstruktif untuk kepentingan Petron. Oleh itu, SDBB bertangggungjawab mengembalikan wang itu kepada pemilik yang berhak, Petron, dan bukan menyimpannya untuk diri sendiri atau melepaskannya kepada pihak lain. Bertentangan dengan kemurnian untuk SDBB menyimpan dan menggunakan RM24,835,281.62 untuk kepentingannya sendiri, walaupun wang itu telah secara sah dan diserah hak secara mutlak kepadanya oleh Swakaya.

(2) Alasan yang diberi oleh SDBB untuk menyokong tuntutannya bahawa ia berhak ke atas wang itu adalah mudah iaitu oleh kerana hasil kontrak SESB telah secara sah 'diberikan' kepada SDBB melalui penyerahhakan hasil kontrak, Petron telah kehilangan segala hak ke atas wang itu. Walau bagaimanapun, alasan ini cacat strukturnya kerana tidak mengambil kira kebenaran bahawa RM24,835,281.62 adalah bayaran untuk jualan bahan api diesel oleh Petron kepada SESB. Ini tidak pernah dimaksudkan sebagai pembayaran balik pinjaman Swakaya dengan SDBB, atau untuk apa-apa tujuan lain.

(3) Tiada keterangan bahawa Petron membenarkan wang itu digunakan untuk mengurangkan pinjaman Swakaya dengan SDBB. Apa yang dibenarkan oleh Petron adalah permintaan Swakaya untuk Petron membekalkan dan menghantar diesel itu terus kepada SESB, dan untuk SESB membayar terus kepada Petron. Sememangnya mustahil untuk

menyatakan bahawa Petron kehilangan segala hak atas wang itu hanya kerana Swakaya telah menyerahhak hasil kontrak secara mutlak kepada SDBB. Desakan SDBB bahawa ia berhak secara sah atas RM24,835,281.62 dan mengekalkannya untuk kegunaan sendiri walaupun mengetahui Petron adalah pemilik benefisial wang itu adalah tindakan tidak berhati perut oleh pihaknya.

(4) Akaun projek CIMB dibuka untuk tujuan spesifik membuat pembayaran kepada Petron untuk bahan api diesel yang dibekalkan dan dihantar kepada SESB. Kedua-dua Swakaya dan SESB bersetuju bahawa RM24,835,281.62 milik Petron. Oleh itu, SDBB tidak berhati perut apabila menuntut hak atas wang itu dengan hanya bergantung pada penyerahhakan hasil kontrak. Antara Petron dan SDBB, dengan jelasnya Petron mempunyai hak yang lebih baik atas wang itu disebabkan bayaran untuk bahan api diesel yang telah dibekalkan dan dihantar kepada SESB.

(5) Terdapat keterangan yang menunjukkan SDBB, sebagai penandatangan tunggal yang diberi kuasa atas akaun projek CIMB, telah membayar kepada Petron sebahagian daripada bayaran, iaitu untuk penghantaran November 2013 dan sebahagian penghantaran Disember 2013. Ini adalah bukti SDBB sendiri telah mengakui bahawa jumlah wang ini yang dibayar oleh SESB ke dalam akaun projek CIMB sememangnya milik Petron.

Case(s) referred to:

Bank of Credit and Commerce International (Overseas) Ltd v. Akindale [2000] 4 All ER 221 ***(refd)***

Beatty v. Guggenheim Exploration Co (1919) 225 NY 380 ***(refd)***

Chempro Technology (M) Sdn Bhd v. Wee Eng Hock & Ors [2010] 1 LNS 1857 HC ***(refd)***

Damai Freight (M) Sdn Bhd v. Affin Bank Bhd [2015] 4 CLJ 1 FC ***(refd)***

Ferguson v. Owen [1984] 9 Ohio St.3d 223 ***(refd)***

Geh Cheng Hooi & Ors v. Equipment Dynamics Sdn Bhd [1991] 1 CLJ 464; [1991] 1 CLJ (Rep) 133 SC ***(refd)***

Montagu's Settlement Trust, Re, Duke of Manchester v. National Westminster Bank Ltd [1992] 4 All ER 308 ***(refd)***

Paragon Finance plc v. DB Thakerar & Co [1999] 1 All ER 400 ***(refd)***

Public Finance Bhd v. Scotch Leasing Sdn Bhd; Perwira Habib Bank Malaysia (Intervener) [1996] 3 CLJ 635 FC ***(refd)***

Qimonda Malaysia Sdn Bhd v. Sediabena Sdn Bhd & Anor [2011] 8 CLJ 269 CA ***(refd)***

Takako Sakao v. Ng Pek Yuen & Anor [2010] 1 CLJ 381 FC ***(refd)***

Tan Sri Dato' (Dr) Rozali Ismail & Ors v. Chua Lay Kim & Ors [2016] 3 CLJ 84 CA ***(refd)***

Tay Choo Foo v. Tengku Mohd Saad Tengku Mansur & Ors And Another Appeal [2009] 2 CLJ 363 CA ***(refd)***

Tudingan Timur Sdn Bhd v. Che Mat bin Padali (Civil Appeal No A-02-1613-2011) (Unreported) ***(refd)***

Legislation referred to:
Civil Law Act 1956, s. 4(3)
National Land Code, s. 433B

Other source(s) referred to:
Halsbury's Laws of England, 4th edn, vol 48, pp 320-321

For the appellant - Saiful Azian Mokhtar; M/s Jayasuriya Kah & Co
For the respondent - Connie Willie; M/s Lind, Willie Wong & Chin

[Editor's note: Appeal from High Court, Kota Kinabalu; Suit No: BKI-22NCVC-98/11-2014 (affirmed).]

Reported by Suhainah Wahiduddin

JUDGMENT

Abdul Rahman Sebli JCA:

[1] This appeal concerns the creation of a constructive trust. The facts are as follows. Swakaya Sdn Bhd ("Swakaya"), a company incorporated in Malaysia was awarded a contract by Sabah Electricity Sdn Bhd ("SESB") to supply and deliver diesel fuel to its power stations. The contract sum was RM506,952,888.75. We shall refer to the contract as "the SESB Contract".

[2] The respondent, Petron Oil (M) Sdn Bhd ("Petron") is a private limited company engaged in the business of supplying petroleum and petroleum related products. Petron sued Swakaya for the sum of RM24,835,281.62, which was the balance owed by Swakaya for the diesel fuel that it had supplied and delivered to SESB in accordance with the SESB Contract, and judgment had been entered against Swakaya for the said sum. Swakaya was not a party to this appeal.

[3] In order to finance and carry out the SESB Contract, Swakaya applied for and was granted two banking facilities by the appellant, Sabah Development Bank Berhad ("SDBB") on terms and conditions set out in the letter of offer dated 12 March 2013 and credit facilities agreement dated 3 April 2013 (for the initial RM50 million) and the letter of offer dated 3 April 2013 and credit facilities agreement dated 23 August 2013 (for the additional RM35 million).

[4] As security for the RM50 million banking facilities granted by SDBB, Swakaya by an Assignment of Contract Proceeds dated 3 April 2013 absolutely assigned all the contract proceeds from the SESB Contract to SDBB. The assignment was expressed to be absolute.

[5] Written notice of the assignment dated 20 March 2013 was given to SESB, and Swakaya irrevocably instructed SESB to remit all contract proceeds from the SESB Contract to a project account with Malayan Banking Berhad, Kota Kinabalu ("the Maybank Project Account").

[6] By a reply letter dated 22 March 2013, SESB acknowledged receipt of the notice of assignment and agreed to the said assignment and instructions contained therein.

[7] As security for the payment of an additional RM35 million banking facilities granted by SDBB, Swakaya executed a Supplemental Assignment of Contract Proceeds dated 23 August 2013. This assignment was also expressed to be absolute.

[8] SDBB's managers and officer(s) were appointed as the authorised signatories of the Maybank Project Account, even though the account was under the name of Swakaya.

[9] It was the testimony of SDBB's witnesses at the trial that SDBB would utilise all of the contract proceeds paid by SESB into the Maybank Project Account to reduce the RM85 million (RM50 million + RM35 million) debt owing by Swakaya to SDBB. Petron however disputed that the contract proceeds could be used for that purpose.

[10] Sometime in October 2013, the Maybank Project Account was frozen by the Malaysian Anti Corruption Agency ("MACC") under the Anti Money Laundering Act 2001. We were not told of the reason why the account was frozen by the MACC.

[11] After the Maybank Project Account was frozen by the MACC, SDBB could no longer withdraw monies from the account and utilise it for reducing Swakaya's RM85 million loan. As a result, Swakaya agreed to open a second account with CIMB Bank Berhad ("the CIMB Project Account") which was to be utilised for the same purpose, ie, for receiving payment of the SESB contract proceeds in place of the Maybank Project Account which had been frozen.

[12] The CIMB Project Account was opened sometime in November 2013 but SDBB's officer and managers were only appointed as the authorised signatories of the account sometime in March 2014.

[13] By letter dated 20 November 2013, SDBB notified SESB of the new CIMB Project Account and also requested that all contract proceeds from the SESB Contract were to be remitted to the CIMB Project Account.

[14] By a second undated notice, Swakaya notified SESB of the assignment of contract proceeds and instructed SESB to remit all contract proceeds from the SESB Contract to the CIMB Project Account.

[15] SESB had acknowledged receipt of the second notice and consented to the said assignment and instructions contained therein. Thereafter, payment of the SESB Contract proceeds were paid by SESB into the CIMB Project Account.

[16] It was common ground that Swakaya had requested Petron to supply and deliver the diesel fuel directly to SESB, and Swakaya consented to SESB making direct payment to Petron. This arrangement was confirmed by a letter dated 15 November 2013 signed by Swakaya and Petron but not by SESB.

[17] Petron had been paid in full for the diesel fuel that it supplied and delivered to SESB for the month of November 2013. Payment was made from the CIMB Project Account. SESB had made payment of RM12,977,480.11 into the CIMB Project Account and Petron had received in full the sum of RM12,977,480.11 for the November 2013 deliveries by way of remittance from the CIMB Project Account.

[18] SDBB believed that these payments were made before its officer and managers were appointed as the authorised signatories of the CIMB Project Account sometime in March 2014. According to SDBB, the payments made by Swakaya to Petron by utilising the CIMB Project Account were made without its knowledge or consent.

[19] Meanwhile, Petron continued to supply and deliver directly to SESB RM50,094,713.79 worth of diesel and SESB had fully paid the sum by remitting payment into the CIMB Project Account. In total, Petron had been paid a sum of RM26,017,121.95 by SESB *via* the CIMB Project Account but RM24,835,281.62 remained unpaid. Petron's suit against Swakaya was for this outstanding sum of RM24,835,281.62 in respect of which, as we mentioned earlier, judgment had been entered against Swakaya.

[20] Petron's suit against SDBB on the other hand was on the ground that despite knowing that the said sum of RM24,835,281.62 was payment made by SESB for the diesel fuel supplied and delivered to SESB by Petron, SDBB proceeded to wrongfully withdraw the said sum to settle part of the credit facilities it granted to Swakaya.

[21] It was Petron's pleaded case that both Swakaya and SDBB were not entitled to withdraw the said sum of RM24,835,281.62 from the CIMB Project Account and by doing so, they had unjustly enriched themselves at the expense of Petron. Petron's case was that SDBB held the RM24,835,281.62 as "trustee" or "constructive trustee".

[22] Given the nature of the dispute between Petron and SDBB, the issue before the learned High Court Judge was whether SDBB held the monies in the CIMB Project Account on trust for Petron. After a full trial, the learned judge found in favour of Petron, hence the present appeal, which we dismissed by a unanimous decision after hearing arguments by both sides. We found no merit in the appeal.

[23] Section 3.1 of the Assignment of Contract Proceeds dated 3 April 2013 that Swakaya granted in favour of SDBB provides as follows: A

> … the Assignor as beneficial owner HEREBY ASSIGNS absolutely to the Assignee all of the Contract Sum to which the Assignor is or may be entitled.

[24] Similarly, section 3.1 of the Supplemental Assignment of Contract Proceeds dated 23 August 2013 provides: B

> … the Assignor as beneficial owner HEREBY ASSIGNS absolutely to the Assignee all of the Contract Sum to which the Assignor is or may be entitled.

C

[25] SDBB's defence to Petron's claim was that the assignment of the SESB Contract proceeds in its favour by Swakaya was a legal and valid assignment as the assignment satisfied the requirements of a legal assignment under s. 4(3) of the Civil Law Act 1956 in that:

(i) it was an absolute assignment; D

(ii) it was in writing; and

(iii) express notice was given to the person from whom the assignor would be entitled to receive the "chose in action".

[26] *Mozley & Whiteley's Law Dictionary* (19th edn) defines a "chose in action" as "a thing of which a person has not the present enjoyment, but merely a right to recover it (if withheld) by action". E

[27] The chose in action in the present case is the SESB Contract proceeds in the sum of RM24,835,281.62. In *Damai Freight (M) Sdn Bhd v. Affin Bank Bhd* [2015] 4 CLJ 1 the Federal Court explained the legal effect of an absolute assignment as follows: F

> [25] In the present case, the assignment document is the LACA, in which clause 7(1) therein states that the appellant, as the Borrower, "absolutely assigns to the bank the lease of the said Land and the full and entire benefit of the Principal Agreement together with the rights, title and interest of the Borrower therein". In this regard, the use of the words "absolutely assigns" in the provision of the LACA clearly demonstrates that the instrument was intended by the parties to be an absolute assignment and not one by way of a charge only (see *Hipparion (M) Sdn Bhd v. Chung Khiaw Bank Ltd* [1989] 2 MLJ 149, SC). The law in relation to absolute assignment is an equitable mortgage and the essence of a mortgage is that there is a transfer of the ownership of a chose in action, not the land, to the mortgagee (see *Bupinder Singh* and *Chuah Eng Khong (supra)*. G H

I

[28] On the strength of this Federal Court authority, SDBB submitted that the effect of the absolute assignment was that there was a valid transfer of the right in the chose in action to SDBB, ie, a transfer of the RM24,835,281.62 SESB Contract proceeds by Swakaya to SDBB.

[29] It was submitted that by reason of the absolute assignment of contract proceeds dated 3 April 2013 and the Supplemental Assignment of Contract Proceeds dated 23 August 2013, SDBB was legally entitled to the RM24,835,281.62 that SESB remitted into the CIMB Project Account.

[30] What the argument amounts to is this. Since the RM24,835,281.62 had been absolutely assigned to SDBB by Swakaya, the money now belonged to SDBB absolutely, never mind that the money was meant as payment for Petron's sale of diesel fuel to SESB.

[31] SDBB's contention was that it had better rights than Petron and even Swakaya over the RM24,835,281.62, and that it was lawfully entitled to keep and utilise the money for its own benefit, in this case to settle the amount owing by Swakaya under the RM85 million banking facilities.

[32] In support of his argument that SDBB was the real owner and had absolute right over the SESB Contract proceeds of RM24,835,281.62, learned counsel cited *Public Finance Bhd v. Scotch Leasing Sdn Bhd; Perwira Habib Bank Malaysia (Intervener)* [1996] 3 CLJ 635 where the Federal Court held as follows at p. 647:

> Subject to statutory intervention and modifications, all kinds of personal property are subject to the *nemo dat* rule from which flows the consequence that nobody can claim any personal property against the real owner of that personal property.

[33] It was submitted that in allowing Petron's claim, the learned trial judge committed two serious errors of law, firstly in failing to consider the legal effect or consequence of the Assignment of Contract Proceeds and secondly, in failing to appreciate that the SESB Contract proceeds had been lawfully and absolutely assigned to SDBB. It was submitted that the second error alone was good enough reason to allow this appeal.

[34] We need to point out that it is not entirely true that the learned trial judge failed to appreciate that the SESB Contract proceeds had been lawfully assigned to SDBB. He did in fact address his mind to the assignment when he said at page 8 of his grounds of judgment:

> In any event, as rightly submitted by learned counsel for the 2nd Defendant, the 2nd Defendant claimed that they were legally entitled to receive the SESB Contract proceeds by reason of the assignment in favour of the 2nd Defendant and it cause grave injustice to the 2nd Defendant as the 2nd Defendant is in law entitled to receive the SESB Contract proceeds as the lawful assignee of those contract proceeds.

[35] To reiterate, Petron's case was that the RM24,835,281.62 that SESB remitted into the CIMB Project Account belonged to Petron and as such was money held on trust by SDBB for Petron. It was submitted that since it was trust money, it was unconscionable for SDBB to retain and utilise the money for repayment of Swakaya's loan facilities with SDBB.

[36] SDBB's contention on the other hand was that Petron's claim must fail as it had not succeeded in discharging its burden of proving that SESB had agreed to make direct payment to it for the supply and delivery of the diesel fuel.

[37] It was pointed out that Petron's pleaded case in essence was that because of the tripartite agreement between Petron, Swakaya and SESB, in particular SESB's agreement to pay directly to Petron, the money which SESB paid into the CIMB Project Account was actually trust money for the benefit of Petron.

[38] Learned counsel for the appellant referred us to the following passage in the learned trial judge's grounds of judgment as proof that the learned judge had accepted SDBB's contention that Petron failed to prove that SESB had agreed to make direct payment to Petron:

> …, since the Plaintiff has failed to prove a material fact to support its pleaded case, namely whether SESB had agreed to the *(sic)* make direct payment to the Plaintiff. This is confirmed by the testimony of Mr. Phillix Laimon (PW-2) as appearing at Q&A Nos. 16 to 18 of PW2-WS that the fact that there was no such agreement or consent is further fortified.

[39] It was argued that if there never was any agreement by SESB to pay directly to Petron, Petron would have no right whatsoever to stake any claim over the monies which were paid into the CIMB Project Account by SESB. According to learned counsel, since Petron failed to prove that there was indeed consent or agreement by SESB to make direct payment to Petron, the whole foundation of Petron's case crumbled.

[40] We reproduce below the whole paragraph of the passage referred to by learned counsel to understand the context in which it was made:

> Bear in mind that the 2nd Defendant in his Statement of Defence had denied Petron's claim and contends that the Assignment of Contract Proceeds ("ACF") of the SESB Contract confirmed that they were entitled for the money paid into the CIMB Project Account to settle Swakaya's banking facilities with SDB, since the Plaintiff has failed to prove a material fact to support its pleaded case, namely whether SESB had agreed to the (sic) make direct payment to the Plaintiff. This is confirmed by the testimony of Mr. Phillix Laimon (PW-2) as appearing at Q&A Nos. 16 to 18 of PW2-WS that the fact that there was no such agreement or consent is further fortified.

[41] It is clear that it was made in the context of SDBB's defence to Petron's claim. In any event, what is more important in our view is not whether SESB had agreed to pay directly to Petron. What is important is whether it was conscionable for SDBB to claim the money as its own and to use it for its own benefit when it was meant as payment to Petron for the diesel fuel that it supplied and delivered to SESB.

[42] This brings us to the common law doctrine of constructive trust. For the authorities, we shall first of all refer to *Halsbury's Laws of England,* 4th edn, vol. 48 where at pp. 320-321 the following passages can be found:

> **584. Nature of constructive trust.** A constructive trust attaches by law to specific property which is neither expressly subject to any trusts nor subject to a resulting trust but which is held by a person in circumstances where it would be inequitable to allow him to assert full beneficial ownership of the property. Such a person will often hold other property in a fiduciary capacity and it will be by virtue of his ownership of or dealing with that fiduciary property that he acquired the specific property subject to the constructive trust. However, a stranger who receives property in circumstances where he has actual or constructive notice that it is trust property being transferred to him in breach of trust will also be a constructive trustee of that property.
>
> A person who holds property on a constructive trust is a constructive trustee in respect of it. He cannot claim for himself any increase in value of the property or any profits earned by it. If he becomes bankrupt the property is not available for his general creditors but for the beneficiaries in whose favour the constructive trust subsists.
>
> In certain circumstances a person is said to be a constructive trustee in a different sense in that no specific property is subjected to a constructive trust but the person is treated constructively as if he had been a trustee so that, like an express trustee, he can be made personally liable to account to the beneficiaries for any losses or gains resulting from his wrongful activities. Treating him as a constructive trustee is merely a formula for imposing an equitable personal liability to account. If he becomes bankrupt, the trust beneficiaries affected by his wrongful activities have no priority but are treated as ordinary creditors as there is no specific property subjected to a constructive trust.

[43] The position in America is no different as the emphasis is similarly on equity and good conscience. In *Ferguson v. Owen* [1984] 9 Ohio St.3d 223, 225, 9 OBR 565, 459 N.E 2d 1293 this was how the court dealt with the issue of constructive trust:

> A constructive trust is defined in 76 American Jurisprudence 2d (1975) 446, Trusts section 221, as:
>
> [A] trust by operation of law which arises contrary to intention and in invitum, against one who, by fraud, actual or constructive, by duress or abuse of confidence, by commission of wrong, or by any form of

unconscionable conduct, artifice, concealment, or questionable means, or who in any way against equity and good conscience, either has obtained or holds the legal right to property which he ought not, in equity and good conscience, hold and enjoy. It is raised by equity to satisfy the demands of justice.

[44] Justice Cardozo spoke in similar vein in *Beatty v. Guggenheim Exploration Co.* (1919) 225 NY 380, 122 N.E. 378 at pp. 386 and 389 when he said:

A constructive trust is the formula through which the conscience of equity finds expression. When property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest, equity converts him to a trustee … A court of equity in decreeing a constructive trust is bound by no unyielding formula. **(emphasis added)**

[45] This common law principle has been applied in Malaysia in numerous cases, amongst them the following: *Tay Choo Foo v. Tengku Mohd Saad Tengku Mansur & Ors And Another Appeal* [2009] 2 CLJ 363; *Qimonda Malaysia Sdn Bhd v. Sediabena Sdn Bhd & Anor* [2011] 8 CLJ 269; [2012] 3 MLJ 422; *Chempro Technology (M) Sdn Bhd v. Wee Eng Hock & Ors* [2010] 1 LNS 1857; *Takako Sakao v. Ng Pek Yuen (f) & Anor* [2010] 1 CLJ 381; [2009] 6 MLJ 751; *Geh Cheng Hooi & Ors v. Equipment Dynamics Sdn Bhd* [1991] 1 CLJ 464; [1991] 1 CLJ (Rep) 133; [1991] 1 MLJ 293; *Tudingan Timur Sdn Bhd v. Che Mat bin Padali* (Civil Appeal No. A-02-1613-2011).

[46] In *Tay Choo Foo (supra)* Mohd Ghazali Yusoff JCA (as he then was) made the following observations at p. 414:

[92] A constructive trust is simply a relationship created by equity in the interest of conscience. According to *Snell's Equity,* 26th edn, at p. 201, a constructive trust is "a trust which is imposed by equity in order to satisfy the demands of justice and good conscience, without reference to any express or presumed intention of the parties." In *The Law of Trusts* by JG Riddal 3rd edn, at p. 359 the learned author's views are as follows:

> The constructive trust is a remedial device that is employed to correct unjust enrichment. It has the effect of taking title to property from one person whose title unjustly enriches him, and transferring it to another who has been unjustly deprived of it …

[47] In *Takako Sakao (supra)*, the facts are these. The appellant Takako Sakao, a Japanese citizen and the first respondent decided to acquire a shop house to operate a restaurant business. The appellant contributed RM194,610 towards the purchase price of the shop house. The property was to be purchased and registered in the joint names of the appellant and the first respondent in equal shares. Instead the first respondent purchased the property for RM950,000 and registered it in her sole name.

[48] The appellant's contention that a trust had arisen in her favour was rejected by the High Court which held that s. 433B of the National Land Code barred the appellant from enforcing any trust that may have arisen in her favour by reason of her contribution towards the purchase price of the shophouse. Section 433B of the National Land Code requires a foreigner to obtain the prior approval of the State Authority to acquire land.

[49] This court affirmed the High Court decision. Takako Sakao then appealed to the Federal Court and succeeded. It was held, *inter alia*, by the Federal Court as follows:

(i) a constructive trust arises by operation of law whenever the circumstances are such that it would be unconscionable for the owner of the property (usually not necessarily the legal estate) to assert his own beneficial interest in the property and deny the beneficial interest of another, citing with approval *Paragon Finance plc v. DB Thakerar & Co* [1999] 1 All ER 400;

(ii) there was a strong element of unjust enrichment and lack of probity on the part of the first respondent;

(iii) it is settled law that trust is an exception to the common law rule of privity of contract. As such the appellant could enforce the trust against both the first and second respondents;

(iv) the appellant was entitled to trace her half share of the property into the hands of anyone who acquired it;

(v) it was not a case in which the appellant deliberately sought to evade complying with s. 433B of the Land Code and she was not guilty of such misconduct. Section 433B had no application to the constructive trust imposed upon the first respondent.

[50] On the authorities, it is clear that SSDB had received the said sum of RM24,835,281.62 from SESB as constructive trustee for the benefit of Petron. Therefore, it was SDBB's duty to return the money to its rightful owner, ie, Petron, and not to keep it for itself or to release it to anybody else. It was contrary to good conscience for SDBB to have retained and used the RM24,835,281.62 for its own benefit, notwithstanding the fact that the money had been lawfully and absolutely assigned to it by Swakaya.

[51] Learned counsel for SDBB argued that *Takako Sakao (supra)* is distinguishable on the facts. Reference was made to the decision of this court in *Tan Sri Dato' (Dr) Rozali Ismail & Ors v. Chua Lay Kim & Ors* [2016] 3 CLJ 84 where this court concluded at p. 108 after citing with approval *Montagu's Settlement Trust, Re, Duke of Manchester v. National Westminster Bank Ltd* [1992] 4 All ER 308 and *Bank of Credit and Commerce International (Overseas) Ltd v. Akindale* [2000] 4 All ER 221:

> It is clear from both of these cases that equity imposes a constructive trust and breach of fiduciary duty on the defendants, in cases where it becomes unconscionable for the defendant to continue to retain the benefit of the trust.

[52] It was submitted that based on the factual matrix of the present case, there was "not even an iota of unconscionable conduct" on the part of SDBB and that SDBB was legally entitled to receive the SESB Contract proceeds by reason of the Assignment of Contract Proceeds.

[53] The question whether SDBB had acted unconscionably in retaining the RM24,835,281.62 and utilising it for its own benefit, ie, for repayment of Swakaya's loan facilities, is essentially a question of fact. The adjective "unconscionable" is a derivative of the noun "conscience" which *The Concise Oxford Dictionary* (9th edn) defines as follows:

> 1. a moral sense of right and wrong esp. as felt by a person and affecting the behaviour (my conscience won't allow me to do that). 2. an inner feeling as to the goodness or otherwise of one's behaviour (my conscience is clear; has a guilty conscience).

[54] Guilty conscience is a state of the mind and in the absence of express admission must be judged from a person's outward acts or omissions. In the present case, the whole basis for SDBB's claim that it was entitled to the RM24,835,281.62 was the Assignment of Contract Proceeds.

[55] The reasoning given by SDBB to support its claim that it was entitled to the money is deceptively simple, ie, that since the SESB Contract proceeds had been lawfully "given" to SDBB by way of the Assignment of Contract Proceeds, Petron had lost all rights over the money.

[56] The reasoning is structurally flawed as it ignores the simple truth that the RM24,835,281.62 was meant as payment for Petron's sale of the diesel fuel to SESB. It was never meant as repayment for Swakaya's loan with SSDB, or for any other purpose.

[57] In any event, there is no evidence that Petron consented to the money being utilised for reducing Swakaya's RM85 million loan with SDBB. What Petron consented to was Swakaya's request for Petron to supply and deliver the diesel directly to SESB, and for SESB to pay directly to Petron.

[58] With due respect, it is stretching the imagination to suggest that Petron had lost all rights over the money merely because Swakaya had assigned the contract proceeds absolutely to SDBB. SDBB's insistence that it was lawfully entitled to the RM24,835,281.62 and retaining it for its own use despite knowing that Petron was the beneficial owner of the money is unconscionable conduct on its part.

[59] There can be no argument that the CIMB Project Account was opened for the specific purpose of making payment to Petron for the diesel fuel that it supplied and delivered to SESB. In fact, both Swakaya and SESB agreed that the RM24,835,281.62 belonged to Petron. It was therefore unconscionable, we must repeat, for SDBB to claim entitlement to the money by relying solely on the assignment of contract proceeds.

[60] As between Petron and SDBB, clearly the former had better rights over the money for the simple reason that it was payment for the diesel fuel that it had supplied and delivered to SESB. SDBB did not supply and deliver any diesel to SESB. In fact, it was not even in the business of supplying petroleum.

[61] There is evidence to show that SDBB being the sole authorised signatory of the CIMB Project Account had paid out to Petron part of the payments, namely for the November 2013 deliveries and part of the December 2013 deliveries. We agree with learned counsel for Petron that this is proof that SDBB itself acknowledged that these sums of monies that SESB paid into the CIMB Project Account rightfully belonged to Petron.

[62] It was for all the reasons aforesaid that we dismissed SDBB's appeal with costs of RM15,000, subject to payment of the allocator fee. The deposit was refunded to the appellant.